



August 2, 1999

Ms. Elaine S. Hengen
Assistant City Attorney
Office of the City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR99-2173

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 127175.

The City of El Paso (the "city") received requests for information relating to the shooting death of a teenager in December 1998 and the El Paso Police Department's policy on the use of excessive force. You have released some of the requested information. You assert that the remaining information is protected from disclosure by sections 552.101, 552.103, 552.108, and 552.117 of the Government Code. We have considered your assertions and reviewed the submitted representative sample of information.¹

First, you assert that section 552.103 of the Government Code excepts some of the requested information from disclosure. Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that: (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). In Open Records Decision No. 638 (1996), this office said that a governmental body may show that litigation is reasonably anticipated when it receives a claim letter that it represents to be in compliance with the Texas Tort Claims Act (the "TTCA"), Chapter 101 of the Civil Practice and Remedies Code.

You represent that the notices are in compliance with the TTCA. Thus, you have made the requisite showing that Exhibits K, L, M, and N relate to anticipated litigation for purposes of section 552.103(a). The requested records therefore may be withheld from public disclosure under section 552.103(a).² However, basic information may not be withheld from public disclosure under section 552.103. Open Records Decision No. 362 (1983). We believe such basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 (1976).³

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

²Because the criminal history record information you seek to withhold under section 552.101 is excepted from disclosure under section 552.103, we need not address your section 552.101 arguments at this time. We also need not address your section 552.108 claim for Exhibits K and L. We caution, however, that some of the information may be confidential by law or may implicate the proprietary interest of a third party. Therefore, if the department receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the department should seek a ruling from this office on the other exceptions raised before releasing any of the requested information. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

³Basic information about an arrested person, an arrest, or a crime may not be withheld under section 552.108. Gov't Code § 552.108(c).

Second, Exhibit R contains medical records. Access to medical records is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Section 5.08 of the MPA provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the written consent of a personal representative if the patient is deceased, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Third, you assert that section 552.117 excepts the social security numbers of former police officers that are contained in Exhibit F. We agree that you must withhold the social security numbers under section 552.117(2).

Fourth, you contend that section 552.108 excepts portions of the use of force policy, which you have highlighted. You inform us that this office had previously ruled on the city's use of force policy. Open Records Letter No. 91-0519 (1991). You further explain that the policy was rewritten in 1997 and 1999, but that the policy has not changed significantly from the version this office reviewed in 1991. Section 552.108 provides in pertinent part as follows:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). This office has held that section 552.108 excepts portions of use of force procedures that state detailed guidelines on the use of force. Open Records Decision No. 531 (1989). However, portions of the procedures that relate to generally known common-law rules, constitutional limitations, or Penal Code provisions are deemed public information. *Id.*

You argue that the marked information contains "confidential tactical procedures the release of which could endanger the lives and safety of police officers." After a review of your arguments and the submitted information, we agree that you may withhold the highlighted portions in Exhibits O, P, and T; the remainder of the exhibits must be released.

Lastly, you assert that Exhibits I and J are confidential under section 51.007(c) of the Family Code. However, we note that you state that you have released Exhibits I and J. Exhibit I contains a press release and newspaper articles. Exhibit J consists of an autopsy report which is public pursuant to section 11 of article 49.25 of the Code of Criminal Procedure.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 127175

Encl.: Submitted documents

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